NO. 91-358

In the
Supreme Court of the United States

OCTOBER TERM 1991

VAN DOUGLAS HUDSON,

Petitioner

VERSUS

STATE OF LOUISIANA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

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QUESTION PRESENTED

Trial counsel, for no strategic reason, failed to produce known eyewitnesses and failed to examine the murder weapon and thus discover its defects. As a consequence he could not and did not present petitioner's genuine defense that he was guilty of manslaughter but not second degree murder.

The question presented is whether the prejudice prong of the Strickland v. Washington test for ineffective assistance of counsel can be found wanting in these circumstances because the trial judge, who tried the case without a jury, opined that subjectively the omitted evidence and defense would have made no difference to him.

Alternatively stated, the question is whether an objective standard is implicit in the prejudice prong of Strickland, so that the uniform federal jurisprudence, which applies an objective standard, is correct, and the Louisiana courts, which employ a subjective standard, are in error.

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OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, Fifth Circuit, is reported at 570 So.2d 204 (La. App. 5th Cir. 1990). The denial of certiorari by the Louisiana Supreme Court is reported at 580 So.2d 920 (La. 1991).

The trial court's oral reasons for refusing to grant petitioner a new trial are not reported. The transcript of this portion of the proceeding is reproduced in Appendix C.

STATEMENT OF JURISDICTION

Jurisdiction to review by certiorari a decision of the highest court of a state in a criminal case is set out in Title 28 of the United States Code, Section 1257(a), and is further provided for in Rules 10.1(b) and (c) of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.

LSA-R.S. 14:30.1 ("Second Degree Murder"):

> A. Second degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, forcible

rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, first degree robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

* * *

B. Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

LSA-R.S. 14:31 ("Manslaughter"):

Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would

have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person- ....

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.

LSA-R.S. 14:37 ("Aggravated Assault"):

Aggravated assault is an assault committed with a dangerous weapon.

Whoever commits an aggravated assault shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

LSA-R.S. 14:36 ("Assault Defined"):

Assault is an attempt to commit a battery, or the intentional placing of another in reasonable apprehension of receiving a battery.

LSA-R.S. 14:2 ("Definitions"):

> In this Code the terms enumerated shall have the designated meanings:...
>
> (4) "Felony" is any crime for which an offender may be sentenced to death or imprisonment at hard labor.
>
> * * *
>
> (6) "Misdemeanor" is any crime other than a felony.

STATEMENT OF THE CASE

This was a barroom shooting. The charge was second degree murder. The factually available defense was a partial defense, the lesser included offense of manslaughter. Because of counsel's sloth, the defense of manslaughter was not presented at all.

1. The decedent was obnoxious to petitioner's friends in the bar. When petitioner attempted to pacify the decedent, the decedent escalated the tension. Petitioner left the bar and returned with a shotgun. Shortly after his return, peti-

tioner discharged the shotgun once, killing the decedent.

2. At trial, petitioner's counsel argued insanity (from psychiatrists called by him who testified that petitioner was sane). He argued self-defense (from a witness called by him who falsely placed a gun in the decedent's possession). He failed to argue, because he failed to produce witnesses whom he had interviewed and who supported the defense, that petitioner's responsibility was mitigated to manslaughter by heat of blood. He also failed to argue, because he failed altogether to have the shotgun examined, that this was manslaughter from a quirky shotgun discharging accidentally in the course of petitioner's aggravated assault of the decedent.[1]

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[1]A homicide, committed without any intent to cause death or great bodily harm, is manslaughter under Louisiana law when the offender is engaged in the perpetration or attempted perpetration of any intentional misdemeanor directly affecting the person.

3. Trial counsel had interviewed, early in the case, two witnesses who were at the center of the affray. These witnesses would have testified, as they did at the post-verdict hearing, that when petitioner reentered the bar with the shotgun, he held the shotgun in one hand pointed towards the ceiling. These witnesses would have testified that as petitioner held the shotgun pointed towards the ceiling, the decedent charged him, pushing one of the witnesses aside, daring petitioner, "Shoot me, motherfucker." These witnesses would have testified that as petitioner lowered the shotgun from the vertical to the horizontal in response to the decedent's rush at him, the shotgun discharged into the charging decedent.

LSA-R.S. 14:31. Under Louisiana law, aggravated assault is a misdemeanor directly affecting the person. LSA-R.S. 14:37; LSA-R.S. 14:2(4).

An expert examination of the shotgun would have disclosed that the shotgun had an unusual center of gravity which caused pressure to be exerted on the trigger when the shotgun rotated downwards from the vertical; a safety that could be released accidentally during simple rotation from the vertical to the horizontal; and a trigger that would cause the shotgun to discharge during rotation without being squeezed. In other words, expert testimony would have demonstrated that the mere rotation of the shotgun from the vertical to the horizontal, during decedent's charge at petitioner, could have caused the shotgun to discharge without any specific intent to kill or to inflict great bodily harm. Intent to kill or to inflict great bodily harm is an essential element for second degree murder under Louisiana law.

4. Trial counsel, during the two and one-half year delay between indictment and

trial, simply lost track of the eyewitnesses who supported the defense of manslaughter, and he took no significant step to find them and produce them. Quite early on, the original addresses for these witnesses became invalid. At that point, counsel asked members of petitioner's family to look for the witnesses, but their efforts were of no avail. He took no other significant step to locate them.

Indeed, at a point 16 months before the trial at which petitioner was convicted, trial counsel was admonished to do better. Counsel had moved for a continuance based on the lack of service and therefore the unavailability of one of the crucial witnesses. The trial judge, who ultimately did grant a continuance on other grounds, chastised trial counsel for his lack of diligence. He noted that the same incorrect address had resulted in a failure of service for the trial setting two months earlier.

> [T]hat's plenty enough time for a subpoena to be issued by defense counsel and then other methods to be taken rather than on the day of trial saying a continuance is requested because she's not available.... **[O]ther things should have been done.**

In the next 16 months, trial counsel did **no** "other things" to locate the witnesses. Personally, he engaged in no significant search for them, and he hired no investigator to assist him.

5. After verdict, an investigator retained by new counsel easily found the two witnesses. They were located, subpoenaed, and appeared in court to testify on the post-verdict motions within approximately two weeks of the commencement of the investigator's efforts.

Trial counsel offered no excuse for his negligence. He testified that he actively desired the presence of the two eyewitnesses. He wanted their evidence of provocation and accidental discharge to support the

manslaughter defense. He admitted that there was no strategic reason for failing to look for, find and produce them.[2] He also gave no explanation why he did not have the shotgun examined.

6. Without witnesses to support the only legitimate, factually supported defense to the charge of second degree murder, the lesser included offense of manslaughter, trial counsel advised petitioner to waive trial by jury. He threw his client on the mercy of the court. The court, faced with a silly insanity defense and a patently bogus self-defense claim, felt no mercy. It

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[2]

Q. [W]as there a tactical or strategic reason for you not to make any effort to see that they [the witnesses] were here?

A. No. The reciprocal was true. I wanted them here.

Transcript of hearing on Motion for New Trial, at 706-707.

found petitioner guilty of second degree murder. It had heard none of the evidence which could have mitigated the offense to manslaughter.

After verdict, but before sentencing, petitioner hired new counsel who filed a motion for new trial based on ineffective assistance of counsel. The eyewitnesses testified at the hearing on the motion, as did the experts who examined the shotgun. The trial court denied the motion, and sentenced petitioner to the statutorily mandated penalty for second degree murder, life imprisonment.

Petitioner appealed to the Louisiana Court of Appeal, Fifth Circuit, which affirmed. 570 So.2d 504 (La. App. 5th Cir. 1990). The Supreme Court of Louisiana declined to hear petitioner's appeal under its certiorari jurisdiction. 580 So.2d 920 (La. 1991).

REASONS WHY CERTIORARI SHOULD BE GRANTED

In Strickland v. Washington,[3] this Court ruled that the right to counsel guaranteed by the Sixth and Fourteenth Amendments encompasses the right to **effective assistance** of counsel. One is entitled to assistance of a "reasonably competent attorney" under accepted standards of attorney conduct. Strickland makes the standard of attorney competence an objective one. To demonstrate ineffectiveness, "the defendant must show that counsel's representation fell below an objective standard of reasonableness[;]... reasonableness [is to be determined] under prevailing professional norms." 466 U.S. at 687-688.

There is a two-prong test, however. Under the first prong, the defendant must show that, "in light of all the circumstances, the identified acts or omissions were

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[3]446 U.S. 668 (1984).

outside the wide range of professionally competent assistance."[4] It is made explicit in Strickland that this prong is to be determined on objective criteria.[5] Under the second prong, the defendant must show that his counsel's incompetence caused him prejudice -- that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[6]

> A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached **would reasonably likely have been different** absent the errors.
>
> Id. at 696 (emphasis added).

An objective standard is implicit in the Court's statements, but the requirement for

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[4]Id. at 690.

[5]Id. at 687.

[6]Id. at 694.

an objective evaluation of prejudice is not stated explicitly.

Both prongs must be satisfied, but a court, in the interests of judicial efficiency, may reject a defendant's claim of ineffectiveness without testing under both prongs, if it finds an insufficient showing on either prong.[7] In our case, the Louisiana appellate court based its ruling on the foreshortened analysis, finding only that there was no prejudice to petitioner. However, the court employed a subjective standard on the prejudice prong, a standard implicitly rejected in Strickland. In utilizing a subjective standard, the Louisiana court acted in direct conflict with the considerable federal appellate jurisprudence on the point.

An application of both prongs of the Strickland test under correct, objective

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[7] Id. at 697.

standards compels a new trial for petitioner. The Court should grant the writ to bring the State of Louisiana into compliance with the law on effective assistance of counsel which has been established implicitly by this Court, and explicitly and consistently by the federal courts of appeals.

1. Although avoided by the Louisiana appellate court, the first prong of the Strickland test must be applied, and satisfied, before warranting an examination of the issue that cries out for review. Under this prong, trial counsel is afforded a "strong presumption" that his challenged action was reasonable. This presumption is based on the deference that must be accorded counsel's strategic decisions in the face of trial: "[T]he defendant must overcome the presumption that, under the circumstances,

the challenged action 'might be considered sound trial strategy.'"[8]

On the decision to investigate or not, Strickland elaborates:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigations. **In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.**
>
> 466 U.S. at 690-691 (emphasis added).

In our case, the Louisiana appellate court did not try to characterize trial counsel's failure to find and produce the two central eyewitnesses, and his failure to have the shotgun examined, as strategic choices. Indeed, it could not have so found because

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[8] Id. at 689.

trial counsel admitted that there was no strategic basis for his actions.[9]

a. Trial counsel failed to investigate the whereabouts of the two eye witnesses who were crucial to his planned defense. This resulted, quite naturally, in his failure to

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[9]The Court in Strickland suggested that the fundamental guidelines to determine reasonableness of attorney conduct are "[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2nd ed. 1980)(The Defense Function)." Id. at 688. The Commentary to Standard 4-4.1 makes explicit what is expected under professional norms:

> Considerable ingenuity may be required **to locate persons** who observed the criminal act charged or who have information concerning it.... The resources of **scientific laboratories** may be required **to evaluate** certain kinds of evidence:... ballistics tests may be necessary. **Neglect of any of these steps may preclude the presentation of an effective defense....** The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; **without careful preparation, the lawyer cannot fulfill the advocate's role.**

produce them at trial and negated his ability to even raise the defense which he testified he had intended to present -- manslaughter by reason of provocation. Counsel had interviewed the two eye witnesses he failed to produce. He "wanted them" to testify. He understood their significance to the defense of manslaughter. He simply lost track of them and then made no significant effort to locate them. He dropped the ball for no reason but negligence or sloth.

b. Trial counsel also failed to examine or to have examined the weapon used in the shooting. The forensic failure resulted, not arguably but necessarily, in counsel's failure to raise a clearly available defense -- manslaughter by reason of accidental discharge during a misdemeanor aggravated assault. Moreover, expert testimony about the unbalanced shotgun complemented the evidence of the decedent's sudden charge

at petitioner, and together with it presented a much stronger case for counsel's originally intended manslaughter-provocation defense.

Given the ample fee counsel received, lack of money for a forensic examination (whatever merit such an excuse might have in other circumstances) was not involved. Given the lapse of two and one-half years between arrest and trial, there is no possibility that lack of time was a factor. Trial counsel, at the post-verdict hearing, could offer no strategic reason, let alone any reason at all, for his failure to examine the shotgun.

c. Neither of the two failures to investigate was based upon a strategic decision. The failure to produce the two lay witnesses was, in fact, wholly inimical to trial counsel's admitted defense strategy, and caused the disastrous alteration of that strategy and a trial in which a genuine

defense was not presented at all. As to the shotgun, trial counsel simply neglected to investigate a fundamental aspect of this shooting case which would occur to any first-year law student. Trial counsel fell grossly below objective standards of professionally competent assistance.[10] The fed-

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[10]The state appellate court stated that "the strong efforts taken to establish an insanity defense... reflects [sic] that the defendant was afforded effective legal representation..." 570 So.2d at 508. This statement both ignores the record and is besides the point. The statement ignores the record because trial counsel's "strong efforts" to present an insanity defense consisted of putting on three expert witnesses, all of whom testified **on direct examination** that the defendant was capable of distinguishing right from wrong at the time of the shooting -- "strong efforts" indeed! The statement is besides the point because the frittering away of a viable defense -- manslaughter -- for **no strategic reason** cannot be excused simply because some other defense was presented -- even had that defense been presented effectively. A doctor who neglects to continue a septic patient on a course of antibiotics is not proven competent because he later successfully performs an amputation of the patient's leg.

eral appellate jurisprudence consistently condemns such performances.[11]

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[11]Harris v. Reed, 894 F.2d 871 (7th Cir. 1990)(defense counsel's "overall performance, including his decision not to put on any witnesses in support of a viable theory of defense, falls outside the wide range of professionally competent assistance..." -- at 878); Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990)(reliance on a witness' statement, that a second alibi witness could not be located and a third did not wish to testify, "falls short of the diligence that a reasonably competent attorney would exercise under similar circumstances; decision to rely on one asserted defense (misidentification) "does not excuse [the] failure" to investigate a second, compatible defense (alibi), so that the failure cannot be dismissed as a "tactical decision" -- at 129-130); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989)(defense counsel's decision to rely upon defendant to track down witnesses rather than hiring an investigator held to constitute a "complete abdication of the duty to investigate recognized in Strickland... and caused [counsel's] performance to fall below the minimum standard of reasonable professional representation" -- at 712); Tosh v. Lockhart, 879 F.2d 412 (8th Cir. 1989)(counsel ineffective because "Tosh's counsel believed testimony by the [witnesses] was important to Tosh's case, this testimony was in fact significant, and counsel did not make reasonable efforts to procure the testimony" -- at 414); Montgomery v. Petersen, 846 F.2d 407 (7th Cir. 1988)(trial counsel's failure to locate and interview an important witness for the

2. It is Louisiana's application of the prejudice prong of Strickland's test which warrants the grant of certiorari review. Under Strickland, the determination of prejudice from grossly deficient lawyering is implicitly an objective inquiry: "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 446 U.S. at 686. The Louisiana appellate court, howev-

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defense held to be inexcusable notwithstanding the fact that counsel was not supplied the witness's name; although all counsel had to go on was a sales slip initialled by the witness clerk, the sales slip provided an adequate lead to the witness "as evidenced by the ease with which the petitioner's wife and mother-in-law were able to find him" for the post-conviction hearing -- at 414); Sullivan v. Fairman, 819 F.2d 1382 (7th Cir. 1987)(trial counsel had names and addresses to work with, but "made a conscious choice not to use an investigator to locate the missing witnesses, despite his awareness that one could be hired at no cost to him or the defendant -- at 1387; counsel's efforts to phone the witnesses and send letters to them condemned as "perfunctory at best" -- at 1392).

er, rejected objective inquiry and instead applied a subjective standard: whether the trial judge would have changed his mind if the omitted evidence and defenses had been presented. The Louisiana decision is in conflict both with Strickland and with the body of federal appellate jurisprudence following Strickland. That jurisprudence appears uniformly to hold that when counsel's incompetence prevents a genuine defense from being presented at all, prejudice within the meaning of Strickland has been demonstrated, whether or not the judge hearing the ineffectiveness motion would be convinced to acquit.

a. Strickland describes the decision under the prejudice prong as a mixed question of fact and law. 466 U.S. at 698.[12]

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[12]See also, Harich v. Wainwright, 813 F.2d 1082, 1090 (11th Cir. 1987); United States ex rel Smith v. Lane, 794 F.2d 287, 289 n. 3 (7th Cir. 1986).

Once the facts are determined, however, the question of prejudice should be one of law objectively applied to the facts. Strickland states the question as whether:

> there is **a reasonable probability** that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
>
> Id. at 694 (emphasis added).

The defendant need not show "that counsel's deficient conduct **more likely than not** altered the outcome in the case." Id. at 693. "A reasonable probability is a probability **sufficient to undermine confidence in the outcome.**" When counsel's conduct results in the omission of evidence, defendant need not show "by a preponderance of the evidence" that the omissions "determined the outcome." Id. at 693-694. These are standards regularly utilized by the courts and regularly applied objectively.

b. The trial judge in petitioner's case decided that he would not have changed

his mind and returned a different verdict if the squandered evidence and defenses had been presented. The Louisiana appellate court affirmed based on this subjective reaction to the evidence and defenses:

> [T]he determination of whether sufficient provocation existed for reduction of the grade of homicide is a factual question which must be answered by the fact-finder in the case. [Citation omitted.] The trial judge was the fact-finder in this case. After hearing all of the testimony presented on the motion for a new trial, **the trial judge found that no evidence was submitted which would justify disturbing his original second degree murder verdict....**
>
> State v. Hudson, 570 So.2d 504, 507 (La. App. 5th Cir. 1990)(emphasis added).

The personal opinion of the trial judge, however, even when he was, as here, acting as the finder of fact, is not what Strickland's objective standard of prejudice means.

c. The federal courts of appeal appear to uniformly hold that there is to be an

objective application of the prejudice prong, and that when counsel's deficient conduct causes the omission altogether of a genuine defense, prejudice has been objectively demonstrated.

In Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986), the defendant had a single defense, alibi. Trial counsel failed to investigate any of the leads to alibi witnesses given to him by the defendant. At trial, three victims and an alleged accomplice testified against the defendant, and the alibi defense was never raised. The Eleventh Circuit wrote:

> We do not determine whether, despite the eyewitness testimony, [other] testimony [of an alibi defense] **would** have resulted in [the defendant]'s acquittal. See Strickland, 104 S.Ct. at 2068 (rejecting outcome determinative test for evaluating ineffective assistance claims). We conclude that, in this case, [trial counsel]'s failure to adequately investigate and present [the defendant]'s [other] alibi defense deprived [the defendant] of a fair trial.... **[C]ounsel's short-**

> **comings effectively deprived defendants of any defense whatsoever.**

Id. at 1484 (emphasis added).[13]

In Harris v. Reed, 894 F.2d 871 (7th Cir. 1990), trial counsel dropped his investigation of a viable defense to a murder charge (another assailant) and failed to call witnesses whom he knew could have testified to support it. Even though counsel strategically decided not to put on that theory of defense based on the weakness of the state's case and his estimation of the strength of the witnesses' likely testimony, the Seventh Circuit concluded:

> counsel's overall performance, including his decision not to put on any witnesses in support of a viable theory of defense, falls outside the wide range of professionally competent assistance.

Id. at 878.

The court found prejudice based on the omission of an entire theory of defense

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[13]**See, infra,** the discussion of Nealy.

which constituted the only affirmative defense available to the defendant.

In Lawrence v. Armontrout, 900 F.2d 127 (8th Cir. 1990), where trial counsel failed to investigate and produce known witnesses essential to a theory of defense which he did not present, the Eighth Circuit ruled that trial counsel's decision to rely on one asserted defense (misidentification) "does not excuse [the] failure" to investigate a second, compatible defense (alibi). **Id.** at 130. The Eighth Circuit did not rule on the prejudice component directly, but instead remanded. In its remand, however, the court stated the standard for proving prejudice thusly:

> To affirmatively prove prejudice, a petitioner ordinarily must show not only that the testimony of uncalled witnesses would have been favorable, but also that those witnesses would have testified at trial.... On remand, the district court must determine whether [the defendant] can show prejudice **by demonstrating that the uncalled alibi witnesses**

> **would have testified if asked, and that their testimony would have supported Lawrence's alibi."**
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> Id. at 130-31.

The remand required an objective, not subjective, evaluation.[14]

The federal appellate courts also have found prejudice where, although counsel's failure to investigate and present available witnesses has not denied the defendant an

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[14]In Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978), although decided before the Strickland test was formulated, trial counsel's failure to investigate the known witnesses to develop a mitigating defense of manslaughter based on provocation, a defense which was factually supported, was held to constitute ineffective assistance of counsel. Similarly, in another case decided before Strickland, the Fifth Circuit held:

> When a defense counsel fails to investigate his client's only possible defense, although requested to do so by him; [sic] and fails to subpoena witnesses in support of the defense, it can hardly be said that the defendant has had the effective assistance of counsel. [citations omitted].
>
> Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972).

affirmative defense, the missing testimony would have significantly helped the defendant's case.[15] These cases similarly

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[15]In Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985), the defendant had a single defense: alibi. Trial counsel failed to investigate any of the leads to three alibi witnesses which were provided to him. At trial, the defendant testified on his own behalf, contradicting the testimony of his alleged accomplice. The Fifth Circuit found that where, in a "swearing match,"

> the missing testimony **might have affected** the jury's appraisal of the truthfulness of the state's witness and **its evaluation of the relative credibility of the conflicting witnesses**, [the defendant] has stated a claim for ineffective assistance of counsel.

Id. at 1174 (emphasis added).

In Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990), also involving a barroom brawl and shooting, trial counsel failed to interview or call a known eyewitness who would have supported the defendant's only defense--self-defense. Self-defense was asserted at trial, but counsel presented insufficient evidence either to support an instruction or argument to the jury. The Eighth Circuit concluded that the omitted testimony was therefore "crucial to the defendant's only defense" and held that, because trial counsel "nonetheless failed to interview or call this witness to the stand, although he knew of his existence, knew of

have applied an objective test for prejudice.

The federal appellate jurisprudence on point thus condemns the subjective standard that the Louisiana court applied. It also compels the objective conclusion that petitioner was prejudiced by his trial counsel's failure to investigate the whereabouts and obtain the known testimony of the two eyewitnesses and subject the shotgun to forensic examination. Both investigations would have significantly supported petitioner's only viable defenses.[16]

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his testimony, and was able to contact him," the defendant "received ineffective assistance of counsel and was prejudiced thereby." Id. at 833.

[16]The Louisiana appellate court used the phrase, "viable defense," 570 So. 2d at 508, but in context, the court was only suggesting that petitioner's defense was not "viable" because the trial judge subjectively would not have changed his mind. Although it said the following:

> Since the testimony of the witnesses who appeared at the hearing on the motion for a new trial

CONCLUSION

Strickland v. Washington implicitly requires an objective application of the prejudice prong of the test for ineffective assistance of counsel. The federal courts of appeal uniformly evaluate prejudice under objective standards. Indeed, when a genuine defense has not been presented because trial counsel has fallen below objective standards

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> **would not have established a viable defense**, the performance of the defendant's trial counsel was not deficient for failing to obtain the presence of these witnesses at trial.

the court simply meant:

> Since the testimony of the witnesses who appeared at the hearing on the motion for a new trial **would not have changed the trial judge's mind**, the performance of the defendant's trial was not deficient for failing to obtain the presence of these witnesses at trial.

The trial judge's subjective finding to one side, the appellate court engaged in no objective evaluation for "viability" of the defenses presented by the eyewitnesses and forensic experts.

of competence, the federal appellate courts uniformly find that the prejudice prong of Strickland has been objectively satisfied.

The Louisiana decision directly conflicts with the federal appellate jurisprudence, and with Strickland's implicit requirement that prejudice be evaluated under objective, and not subjective, criteria. Certiorari should be granted to make Strickland's objective standard explicit, and to bring Louisiana in line with the uniform body of federal appellate jurisprudence.

Respectfully submitted,

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August 1991

APPENDIX A

STATE OF LOUISIANA	*	NO. 90-KA-255
VERSUS	*	COURT OF APPEAL
VAN DOUGLAS HUDSON	*	FIFTH CIRCUIT
		STATE OF LOUISIANA

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, NO. 86-2187, DIVISION "N", HON. JAMES L. CANNELLA, JUDGE

EDWARD A. DUFRESNE, JR.
JUDGE

(Court composed of Judges Lawrence A. Chehardy,
Edward a. Dufresne, Jr. and Sol Gothard)

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AFFIRMED

The defendant, Van Douglas Hudson, was indicted with the second degree murder of Jack Mulkey, in violation of LSA R.S. 14:30-.1. He entered a plea of not guilty and not guilty by reason of insanity. Initially the

trial court found the defendant lacked the mental capacity to proceed and committed him to the Feliciana Forensic Facility. He was later adjudged competent to proceed and after a two day bench trial, the judge found the defendant guilty of second degree murder. The defendant's motion for a new trial was denied and he was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. From this conviction and sentence the defendant has appealed and urged that the trial court erred in failing to grant him a new trial. The other assignment concerning the jury trial waiver has been withdrawn by the defendant and is considered abandoned.

FACTS

Around 2:30 a.m. on July 29, 1986, Van Douglas Hudson, the defendant, entered Buddy's Escape Lounge in Kenner with his wife, Barbara Hudson, and friends Cynthia Bradshaw, Lynda Bradshaw and Priscilla

Horne. The owner of the lounge, Lester Athmann, was tending bar at the time. One of the other patrons, Jack Mulkey, who had been at the lounge for several hours, appeared to be rather intoxicated. While the defendant and his wife went to the dance floor, Mulkey got up and walked over to where the women were sitting. He attempted to strike up a conversation with the women and expressed a particular interest in Lynda Bradshaw. Athmann noticed that a disagreement was developing and he went over to the group. The women complained to Athmann that Mulkey was bothering them and that he refused to leave them alone, despite being requested to do so. The defendant then walked over from the dance floor and began talking to Mulkey. Believing that the situation had been resolved, Athmann returned to his other bartending duties. When Athmann checked on the defendant's group about fifteen minutes later, he noticed a

pistol on the bar and was told that the gun belonged to Van Hudson. Athmann told Van Hudson to remove the weapon from the lounge immediately. The defendant picked up the pistol, placed it in his pocket and headed out the door of the lounge. A short time later, he reappeared at the door, which was equipped with an electronic "buzzer type" entry device. Athmann looked at the defendant, saw nothing unusual and pressed the electronic buzzer to allow him back into the lounge. However, as the defendant walked through the door, Athmann and the others in the lounge saw that the defendant was armed with a short barreled 12 gauge shotgun. He took a few quick steps toward Mulkey, who was still at the bar, pointed the shotgun directly at him and made a comment to the effect that Mulkey was going to get what he had asked for. Holding a beer can in his right hand, Mulkey turned toward the defendant and stated something suggesting that he

did not believe the defendant would shoot him. Nevertheless, the defendant did fire a shot which struck Mulkey in the chest and killed him, after tearing off a portion of the victim's left hand, which he had raised in a futile effort to ward off the shotgun blast. After firing that round, the defendant ejected the expended shell from the shotgun and chambered another live round. Backing toward the door of the lounge with the shotgun held ready to shoot, the defendant ordered his wife to pick up his drink and his money from the bar and to join him. She complied; and the defendant, his wife, and the other women in their group then hurriedly left the lounge. Within hours of the shooting, the defendant had been identified as the perpetrator of the crime. The police obtained a warrant for the defendant's arrest and proceeded to his residence with the warrant. Although the defendant was not at home, his wife was there and she

consented to a search of the couple's automobile. While conducting the search, police officers found the murder weapon in the vehicle's trunk. The defendant was arrested and charged with second degree murder.

At trial, the defendant urged not only an insanity defense, but also a claim that he killed Mulkey in self-defense. This claim of self-defense was based solely on Barbara Hudson's testimony that Jack Mulkey was armed with a pistol and was going for that weapon when her husband shot him.

In support of the insanity defense, testimony was elicited and medical records were presented concerning the defendant's lengthy history of psychological problems and the prescription of medication in allegedly excessive doses as part of the defendant's treatment for those problems. The trial judge, sitting as the fact-finder in the case, rejected both the self-defense and insanity defenses.

ASSIGNMENT OF ERROR NUMBER ONE

The trial court erred in failing to grant defendant's motion for new trial and amended motion for new trial.

DISCUSSION

The defendant's motion for a new trial, as amended, asserts an ineffective assistance of counsel claim. The Louisiana Supreme Court has held that the appropriate avenue for asserting a claim of ineffective assistance of counsel is through post-conviction relief, rather than by direct appeal. State v. Truitt, 500 So.2d 355 (La. 1987). The purpose underlying the use of post-conviction relief procedure is to afford the parties an evidentiary hearing before the trial court on the ineffective assistance claim, thereby creating an adequate record for appellate review. State v. Brown, 384 So.2d 983 (La. 1980). That same purpose is served by asserting an ineffective assistance of counsel claim in a motion

for a new trial filed with the trial court under La. C.Cr.P. art. 851 et seq. A new trial motion is therefore another proper vehicle for alleging ineffective assistance of counsel. See State v. Perkins, 539 So.2d 100 (La. App. 5th Cir. 1989). Since the motion for a new trial, the denial of which the defendant now challenges, was based on a claim that the defendant lacked effective assistance of counsel.

The defendant alleges two grounds as the basis of the ineffective assistance of counsel claim. He first complains that his attorney failed to secure the presence at trial of witnesses Lynda Bradshaw and Cynthia Bradshaw. The defendant next contends that his attorney's failure to have the shotgun involved in this case scientifically examined further constitutes ineffective legal assistance. At the hearing on the motion for a new trial, Lynda Bradshaw and Cynthia Bradshaw testified about the

victim's obnoxious behavior and the verbal confrontations between the defendant and the victim prior to the shooting. A private investigator was then called to detail the actions he took to locate the Bradshaws and to secure their presence at the hearing. Firearms and engineering experts were also called as witnesses to testify about the results of their testing on the defendant's shotgun. These experts stated that the triggerpull required to operate the weapon was light, though still within the manufacturer's specifications. One of the expert witnesses further expressed the opinion that an unintentional discharge of the shotgun might occur under certain conditions. The defendant argued on the motion that it was impossible to formulate a coherent defense without the Bradshaws' testimony and a scientific examination of the shotgun.

According to the defendant, the testimony of Lynda Bradshaw and Cynthia Bradshaw

established sufficient provocation of the defendant to remove the killing of the victim from the definition of second degree murder. Moreover, the expert testimony established that the firing of the weapon in this case could have been accidental, thereby negating the specific intent required to commit second degree murder. After the evidence presented at the hearing, the trial judge denied the motion for a new trial.

Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) establishes a two-fold test to evaluate claims of ineffective assistance of counsel. First the defendant must show that counsel committed errors so serious that he or she was not functioning as the "counsel" guaranteed a defendant by the Sixth Amendment. Strickland, supra, 104 S.Ct. at 2064. Secondly, the defendant must show that the errors were so serious as to deprive the defendant of a fair trial, one with reliable

result. Strickland, supra, 104 S.Ct. at 2064. The defendant must make both showings in order to prove that counsel was so ineffective as to require reversal.

The defendant has failed to demonstrate that his trial counsel was constitutionally ineffective in his representation. The thrust of the defendant's argument is that his trial attorney failed to offer evidence which would have supported a reduction of the verdict against the defendant from second degree murder to manslaughter. "A murder charge cannot be reduced to manslaughter unless the offense is committed in such passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and reflection." State v. Lee, 529 So.2d 853, 854 (La. App. 4th Cir. 1988). "Heat of blood" and "sudden passion" are not elements of the offense of manslaughter, but rather are mitigating factors which may reduce the

grade of the homicide. State v. Tompkins, 403 So.2d 644 (La. 1981). Moreover, the determination of whether sufficient provocation existed for reduction of the grade of homicide is a factual question which must be answered by the fact-finder in the case. State v. Maddox, 522 So.2d 579 (La. App. 1st Cir. 1988). The trial judge was the fact-finder in this case. After hearing all of the testimony presented on the motion for a new trial, the trial judge found that no evidence was submitted which would justify disturbing his original second degree murder verdict. The expert testimony regarding the defendant's shotgun amounted to nothing more than speculation that the weapon might be susceptible to accidental discharge. The testimony of Lynda Bradshaw and Cynthia Bradshaw, according to the trial judge, added nothing capable of changing the outcome of this case. The victim's behavior, however, obnoxious, was not sufficient

provocation for the defendant's actions in this case. See State v. Gauthier, 546 So.2d 652 (La. App. 4th Cir. 1989). Since the testimony of the witnesses who appeared at the hearing on the motion for a new trial would not have established a viable defense, the performance of the defendant's trial counsel was not deficient for failing to obtain the presence of these witnesses at the trial. State v. Morgan, 472 So.2d 934 (La. App. 1st Cir. 1985). A review of defense counsel's performance throughout this case's protracted course leading up to trial, and particularly the strong efforts taken to establish an insanity defense, reflects that the defendant was afforded effective legal representation within the guarantees of the Sixth Amendment and that a reliable verdict was rendered in the case. Strickland, supra; State v. Dill, 461 So.2d 1130 (La. App. 5th Cir. 1984). Accordingly, the trial judge rejected the defendant's

claim of ineffective assistance of counsel and properly denied the motion for a new trial. State v. Perkins, supra.

This assignment of error has no merit.

We have further reviewed the record for any patent errors and find none.

DECREE

For the above reasons, the sentence and conviction of the defendant are affirmed.

AFFIRMED

APPENDIX B

THE SUPREME COURT OF THE STATE OF LOUISIANA

STATE OF LOUISIANA
VS. NO. 91-K-0116
VAN DOUGLAS HUDSON

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IN RE: Hudson, Van Douglas; - Defendants(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fifth Circuit, Number 90-KA-0255; Parish of Jefferson 24th Judicial District Court Div. "N" Number 86-2187

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May 31, 1991

Denied.

LFC
PFC
WFM
JLD
JCW
HTL
PH

APPENDIX C

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

THE STATE OF LOUISIANA NUMBER 86-2187
VERSUS
VAN DOUGLAS HUDSON DIVISION "N"

Excerpts of the proceedings in the above-numbered and entitled cause taken on October 4, 1989 before the Honorable James L. Cannella, Judge presiding.

APPEARANCES:

FOR THE STATE:
JOHN MOLAISON, Attorney at Law

FOR THE DEFENSE:
ROBERT GLASS, Attorney at Law

Reported by: Sandra B. Hancock, OCR, CSR

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P R O C E E D I N G S

THE COURT:

What's before me is a Motion for a New Trial based on two different reasons.

One is the ineffective assistance of counsel and the other is the ends of justice would be best served by granting the new trial.

The Court has sat through the trial itself and has sat through this motion at which time a number of witnesses were called. The burden of proof is on the Defendant in this case to prove the reasons for and the justification for the relief sought in this Motion for a New Trial.

The Court considers that there are basically two elements that the Defense has submitted.

One relates to the two witnesses, the two sisters. The second element relates to the gun. I'm going to take the easiest one first and that's relative to the gun.

I don't believe that what I heard on the gun in this Motion for a New Trial does anything to add weight to any evidence that might have been submitted at trial. In other words, what I heard was mainly possibilities, speculation; this could have happened, that could have happened. I heard expert witnesses and saw the gun. I heard

testimony of how the gun was normal, ordinary, no more or less than a gun of that kind and of that age. It was not a perfect gun but it was just a regular gun and I don't think that the gun being at the trial would have added anything whatsoever. So, therefore, not having the gun does not harm the Defendant's case.

The second point relates to the two Bradshaw sisters. There was a threshhold question that I had before I got into the locating of the sisters and that is what kind of evidence could the sisters have added that would have made a difference at the trial. Four witnesses testified basically in the trial about the facts, what happened in the lounge that night just prior to the shooting and after the shooting. Those four witnesses gave not totally consistent statements, but the kind of inconsistent statements that you would expect from four people seeing something from a

different perspective. The witnesses were not by any means aligned to the victim or the State in this case. When I heard the testimony of the two sisters in this motion for a new trial and considered what they would add or not to the weight of the testimony at a trial on the merits I considered that if these sisters would have testified to something that would contradict what the other four witnesses had said that would not help the Defendant at all. It would be contradictory testimony. If the sisters would add something that corroborated what the four witnesses have said that would be cumulative and in neither case whether it contradicted or corroborated would have helped the Defendant's case at all. So I don't know how anything that these sisters said and what I heard them say in this motion would help the Defendant's case, add any weight to the evidence presented by the Defendant. Any weight, by that I mean any

weight to his defenses to what he was trying to get across. So, therefore, if they were not present it did not hurt his case at all.

Now, going into what was done to try to locate the witnesses I do not agree with the analogy of an heir in what a court would do if there was an absent heir involved because I believe that's just not the same kind of analogy that a court could look at here. Here we have an attorney paid by a defendant working for a defendant and actually the relatives of the Defendant assisting the attorney. That was enough of a team working for the Defendant so that what they did in this case I believe was ample. It was enough. To now look on it many months later and say you could have done this, you could have done that, an investigator could have found this -- I don't know what could have been found out at the time of trial or right before trial. But I think that the attorney and his family and the Defendant were in the

best position to know what they were doing and at that time I believe everything was done that could have been done.

I don't believe the Defendant has borne his burden of proof. Therefore the Motion for a New Trial is denied.

MR. GLASS:

Note an exception.

THE COURT:

Yes.

MR. GLASS:

We have a right to a delay in the sentencing but we would waive it.

THE COURT:

Mr. Glass, do you have anything to say on your client's behalf before the Court imposes sentence?

MR. GLASS:

No, Your Honor, the Court doesn't have a choice of sentencing.

THE COURT:

Van Douglas Hudson, it's the sentence of this Court that you serve life in prison at hard labor without benefit of parole, probation or suspension of sentence. I remand you into the custody of the Department of Corrections for execution of sentence.

MR. GLASS:

We move for an appeal.